

89-984

No. _____



In The
Supreme Court of the United States

October Term, 1989

BUCKLEY LAND CORPORATION,

v.

Petitioner,

DEPARTMENT OF NATURAL RESOURCES,

a Department of the State of Michigan,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

— AND APPENDICES —

MURRAY & PAWLOWSKI

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QUESTION PRESENTED

WHETHER A STATE CAN, UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, INSULATE ITSELF FROM CLAIMS BROUGHT TO RECOVER UNCONSTITUTIONALLY TAKEN REAL PROPERTY BY IMPOSING A STATUTE OF LIMITATIONS TO BAR SUCH CLAIMS.

LIST OF ALL PARTIES

All of the parties to this action are listed in the caption. _

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**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN**

The Petitioner, Buckley Land Corporation, petitions for a writ of certiorari to review the Order of the Michigan Supreme Court entered on September 26, 1989, denying its Application For Leave To Appeal the opinion and judgment of the Michigan Court of Appeals entered on February 28, 1989.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals entered on February 28, 1989, in favor of the Respondent and affirming the decision of the Ingham County Circuit Court appears in Appendix A to the Petition (beginning at page A-1) and is reported at 178 Mich App 249; 443 NW2d 390 (1989). The opinion and conclusions of the Ingham County Circuit Court appear in Appendix B to the Petition (beginning at page B-1). The Order of the Ingham County Circuit Court entered on September 28, 1987, appears in Appendix C to the Petition (beginning at page C-1) and is not reported.

The Order of the Supreme Court of Michigan entered on September 26, 1989, denying Petitioner's Application For Leave To Appeal the opinion of the Michigan Court of Appeals is reported at 433 Mich 875 (1989) and appears in Appendix D to the Petition (beginning at page D-1).

JURISDICTION

1. The Order of the Supreme Court of Michigan was entered on September 26, 1989 (Appendix D, *infra*, page D-1). In this Order, the Supreme Court of Michigan denied Petitioner's Application For Leave To Appeal the opinion and judgment of the Michigan Court of Appeals entered on February 28, 1989, in *Buckley Land Corp v Department of Natural Resources*, 178 Mich App 249; 443 NW2d 390 (1989), which affirmed the Order of the Ingham County Circuit Court entered on September 28, 1987, in favor of the Respondent (Appendix A, *infra*, pages A-1 – A-3). The state court decision is final.

2. The jurisdiction of this Court is invoked under the Fourteenth Amendment to the United States Constitution and under 28 USC 1257(a). The Petitioner and its predecessors in title have been denied property rights without due process of law, and the state courts failed to protect these rights by finding that the decision in *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976) (a case where the Supreme Court of Michigan held that notice by publication alone in tax sale proceedings is constitutionally inadequate) would not be applied to the facts of this case, and by finding that Petitioner's claims are barred by the 10-year statute of limitations found in MCLA 600.5801; MSA 27A.5801 (Appendix E, beginning at page E-1, pages E-9 – E-10).

3. The constitutional questions were raised in the Ingham County Circuit Court, the Michigan Court of Appeals and the Supreme Court of Michigan by pleading

that the requirements of the Fourteenth Amendment to the United States Constitution were not met in the tax sale proceedings involved in this case, by arguing that the principles of *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976) should be applied retroactively to the facts of this case, and by arguing that the 10-year statute of limitations found in MCLA 600.5801; MSA 27A.5801 could not constitutionally begin to run, if at all, until the *Dow* decision, because it was not until *Dow* that a cause of action based on publication alone in tax sale proceedings was recognized in Michigan. Those parts of the record raising the constitutional questions are set forth in Appendix F, beginning at page F-1, pages F-1 – F-17.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

“Nor shall any state deprive any person of life, liberty, or property, without due process of law.”

2. The Michigan statutes involved are set forth in Appendix E (beginning at page E-1). They are:

1893 PA 206, § 61a; MCLA 211.61a; MSA 7.106

1893 PA 206, § 66; MCLA 211.66; MSA 7.111

1893 PA 206, § 73c; MCLA 211.73c; MSA 7.119(2)

1903 PA 84, § 1; MCLA 211.431; MSA 7.661

1961 PA 236, § 5801; MCLA 600.5801;
MSA 27A.5801

STATEMENT OF THE CASE

This case involves the basic constitutional right to procedural due process of law before a state may take real property, and to what extent, if any, a state may impose a statute of limitations to bar claims to real property taken by methods which were admittedly constitutionally infirm.

Petitioner Buckley Land Corporation's shareholders are beneficiaries of a trust established by Edward Buckley, a Michigan resident who died in 1927. Edward Buckley owned approximately 22,700 acres of land in seven Michigan counties.

At the time of his death Edward Buckley's wife, Edith Hampton Buckley, had been adjudged insane and was committed to the Traverse City State Hospital. See *In Re Buckley's Estate*, 330 Mich 102; 47 NW2d 33 (1951). After his death, Edward Buckley's real estate was placed in trust.

During the tax sales of 1938 and subsequent years, much of this property was sold for unpaid taxes and was bid into the State of Michigan. The only notice given regarding these tax sales was by publication in local newspapers located in the counties where the real property was situated. The Michigan Supreme Court held such notice constitutionally defective in *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976).

In 1972, the Manistee County Probate Court entered a Supplemental Order Of Distribution in which four people received any interest the Edward Buckley Trust had in 567 large parcels of property, 276 village lots and other parcels. These individuals then transferred their interests in this property to Petitioner Buckley Land Corporation by deed.

In September of 1985, Petitioner filed an action against the Michigan Department of Natural Resources to quiet title in itself in all real estate once owned by Edward Buckley and the Edward Buckley Trust which was bid into the State of Michigan in the 1938 and subsequent tax sales and which is still held by the State of Michigan or the Michigan Department of Natural Resources. Petitioner also brought a claim based on unjust enrichment regarding those parcels of real estate which were sold to third parties and for the amounts received for oil, gas, mineral and other leases entered into between the State of Michigan or the Department of Natural Resources and third parties.

Respondent raised a number of affirmative defenses, including the argument that *Dow* was not given retroactive effect and does not disturb the tax judgments regarding the property in question.

Petitioner first raised the constitutional questions in its Complaint To Quiet Title and Amended Complaint To Quiet Title filed in the Ingham County Circuit Court, where it alleged that the requirements of the Fourteenth Amendment to the United States Constitution were not met in the tax sale proceedings involved in this case, and by arguing that the principles of *Dow* had to be applied retroactively to the case (Appendix F, pages F-1 - F-2).

Respondent filed a Motion For Summary Disposition in May of 1987. Petitioner also filed a Motion For Summary Disposition and in its motion and brief filed in the Ingham County Circuit Court, Petitioner again raised the constitutional questions by arguing that the requirements of the Fourteenth Amendment to the United States Constitution were not met in the tax sale proceedings involved in this case, that the principles of *Dow* had to be applied retroactively to this case, and by

arguing that the 10-year statute of limitations found in MCLA 600.5801; MSA 27A.5801 could not constitutionally begin to run, if at all, until the *Dow* decision for the reason that it was not until *Dow* that a cause of action accrued, this Court in *Longyear v Toolan*, 209 US 414; 28 S Ct 506; 52 L Ed 859 (1908) having previously ruled that the very statutory tax foreclosure methods later voided by *Dow* were in fact constitutional. (See Appendix E, *infra*, pages F-3 – F-7).

The trial court heard both motions in September of 1987. The trial court granted Respondent's motion and denied Petitioner's motion. The trial court found that "... this action is time-barred and that more than 10 years has elapsed since the property was deeded to the Plaintiff in this matter", and also declined to apply *Dow* with retroactivity to this case (see Appendix B).

Petitioner raised the same constitutional issues in the Michigan Court of Appeals in its appellate brief. Those parts of the record raising the constitutional questions are set forth in Appendix E, *infra*, pages F-7 – F-11.

In *Buckley Land Corp v Department of Natural Resources*, 178 Mich App 249; 443 NW2d 390 (1989) the Michigan Court of Appeals affirmed the trial court and found that the claims of Petitioner were barred by the 10-year statute of limitations found in MCLA 600.5801; MSA 27A.5801, determined that the statute of limitations began to run at the time of the tax deeds in 1942, and declined to retroactively apply *Dow* (Appendix A).

Petitioner timely filed an Application For Leave To Appeal to the Michigan Supreme Court, raising these same constitutional issues in its Application For Leave To Appeal and Brief In Support Of Plaintiff-Appellant's Application For Leave To Appeal. Those parts of the

record raising the constitutional questions are set forth in Appendix F, *infra*, pages F-11 – F-17. Petitioner's Application For Leave To Appeal to the Michigan Supreme Court was denied on September 26, 1989.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD DETERMINE THE IMPORTANT CONSTITUTIONAL ISSUE OF WHETHER A STATE CAN AVOID THE CONSEQUENCES OF AN ADMITTEDLY UNCONSTITUTIONAL TAKING OF PROPERTY BY IMPOSING A STATE STATUTE OF LIMITATIONS.

Under Michigan's statutory provisions for delinquent tax lands, a county treasurer has to notify property owners that a tax sale is going to take place, but this provision was regarded as non-jurisdictional because MCLA 211.61a; MSA 7.106 provides that failure to send or receive this notice does not invalidate the proceedings or any later decree of sale. Notice of the tax sale had to be published, and according to statute it was by this publication that the circuit courts were said to have acquired jurisdiction over the delinquent tax lands. MCLA 211.66; MSA 7.111 states that this publication was equivalent to personal service of notice on those having an interest in the subject land. MCLA 211.73c; MSA 7.119(2) requires that at least 120 days before the redemption period expires, the county treasurer has to notify all persons whose land was bid off into the State of Michigan that unless the land is redeemed during the redemption period, title will vest in the State of Michigan. This statute, though, states that failure to send or receive this notice would not invalidate the proceedings. There was no evidence in this case that these statutory notices were mailed or received.

Michigan's statutory scheme for notice by publication in tax sale proceedings was upheld against a due process challenge by this Court in *Longyear v Toolan*, 209 US 414; 28 S Ct 506; 52 L Ed 859 (1908), and by the Michigan Supreme Court in *Golden v Auditor General*, 373 Mich 664; 131 NW2d 55 (1964).

In 1976, however, the Michigan Supreme Court changed its position with *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976) and held that the Due Process Clauses of the Michigan and United States Constitutions require an owner of a significant property interest to be given proper notice and an opportunity for a hearing. The Court held that newspaper publication alone was constitutionally inadequate and allowed the property owner's claim even though the statutory redemption period had expired.

The condemned procedure of mere publication is the very procedure by which the present Petitioner's predecessors lost their property rights to the State of Michigan. This violated the Due Process Clause of the United States and Michigan Constitutions, US Const, Am XIV; Const 1963, art 1, § 17.

The *Dow* Court also examined MCLA 211.431; MSA 7.661, which states that after the expiration of six months from the date a deed is given to the State of Michigan no action may be commenced to set aside or vacate the deed, and stated:

"The state cannot rely on this statutory provision to insulate itself from redress if the statutory procedure for tax sales does not meet constitutional requirements. A different question would be presented if rights of third persons had intervened." (Emphasis added). At page 197.

It is undisputed that under current case law mere publication of a notice of hearing and the right of redemption relative to tax sales is constitutionally inadequate. The question next is what effect the holding in *Dow, supra*, has on the tax sales regarding the property involved in the present dispute.

Generally in Michigan overruling decisions are given full retroactive effect. In *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135; 253 NW2d 114 (1977), the Michigan Supreme Court stated:

"It is a general rule of statutory interpretation that an unconstitutional statute is void ab initio. This principle is stated in 16 Am Jur 2d, Constitutional Law, § 177, pp 402-403, as follows:

'The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed.'" At pages 144-145.

The Court noted:

"The prospective-retroactive issue is relevant in situations where a previously valid common-law doctrine or prior judicial rule of constitutional interpretation is being abandoned. Such situations are analogous to the amendment or repeal of existing statutes by the Legislature. However, in the instant case we are concerned with the question of whether an unconstitutional statute is to be given any effect. . . ." At page 146.

Thus, the Court made a distinction between cases that merely overrule common-law doctrines and cases which find a statutory provision unconstitutional. In the latter cases the overruling decision is generally to be applied retroactively.

Petitioner submits that where statutory and prior case law impediments to sue are removed and a cause of action based on constitutionally infirm notice of tax sale proceedings is recognized, the case removing such impediments should be applied to fact situations arising before such a decision to the extent that rights of bona fide third parties have not intervened. Petitioner further submits that in order to meet the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, it is not until such impediments to sue are removed that any statute of limitations can begin to run.

This case then provides an opportunity for this Court to decide the extent to which a state may use its statute of limitations to bar claims that it took property using methods later declared unconstitutional, especially to the extent that the rights of bona fide third parties have not intervened and the state continues to hold the property.

In *Paschall v Christie-Stewart, Inc*, 414 US 100; 94 S Ct 313; 38 L Ed 2d 298 (1973), the United States Supreme Court ruled on a case where it had noted probable jurisdiction to consider whether the published notice provisions of the Oklahoma tax sale statutes comported with due process of law under the Fourteenth Amendment. The Supreme Court found, however, that the running of the Oklahoma period for adverse claims might have been an independent ground for the judgment in the state trial court, and if so,

the Court's decision would be advisory and beyond its jurisdiction.

The Court remanded the case to the Supreme Court of Oklahoma to consider whether the appellants preserved the right to challenge the trial court's determination that the Oklahoma statute of limitations barred their claim, and if so, whether under state law the statute of limitations barred the appellants' claim irrespective of the constitutional adequacy of the tax sale notice provisions. Interestingly the Court stated in a footnote:

"Whether the alleged lack of constitutionally valid notice would preclude the running of the statute of limitations for an adverse land claim is a question that has not been presented to this Court or to the Oklahoma courts below. C.f. *Schroeder v City of New York*, 371 U.S. 208, 213-214 (1962). We intimate no view on this issue." At 414 US page 102.

In *Schroeder v City of New York*, 371 US 208, 83 S Ct 279, 9 L Ed 2d 255 (1962), such a claim was allowed even though the New York statute of limitations had run.

MCLA 600.5801; MSA 27A.5801 is the Michigan general statute of limitations for recovery of real property. If any statute of limitations applies, it would appear to be this statute. If so, Petitioner was required to file its claims within 10 years after its claims accrued. Petitioner's claims, however, did not accrue until the Michigan Supreme Court issued its opinion in *Dow* which removed the statutory and prior case law impediments to challenging tax sales on constitutional grounds. The *Dow* Court issued its opinion on April 1, 1976, and thus, all claims similar to those made by Petitioner

which were filed after April 1, 1986, might be barred by the 10-year statute of limitations. Petitioner, however, filed suit in September of 1985, well before the possible April 1, 1986 deadline. Thus, there will be no opening of the floodgates of tax deed litigation by retroactively applying the holding in *Dow* because probably only those who have filed suit on or before April 1, 1986 are entitled to attack pre-*Dow* sales based on the ground of constitutionally infirm notice.

Petitioner submits that in those cases where a state takes property using methods later declared unconstitutional, the statute of limitations should not begin to run, if at all, until the time the court declares such methods unconstitutional and removes any impediments to sue, at least to the extent that rights of bona fide third party purchasers have not intervened.

CONCLUSION

Petitioner submits that the decision by the Michigan Supreme Court in *Dow* should be applied to the facts of this case, especially because Petitioner is not seeking to recover any property from bona fide third parties. Petitioner's predecessors lost property under tax sale proceedings and methods later declared unconstitutional, and this case involves the extent to which this unconstitutional taking and unjust enrichment to the Michigan government will be remedied.

Petitioner further submits that where statutory and prior case law impediments to sue are removed and a cause of action based on constitutionally inadequate notice of tax sale proceedings is recognized, the case removing these impediments should be applied to fact situations arising before such a decision to the extent that the rights of bona fide third parties have not intervened.

Petitioner further submits that no statute of limitations bars its claims because in order to meet the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, it was not until the impediments to sue were removed in *Dow* that any statute of limitations could begin to run.

It is also submitted that the issue of retroactive application of state statutes which have been found unconstitutional under the Fourteenth Amendment to the United States Constitution is an important one which needs to be resolved by this Court.

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari shall issue to review the Order of the Michigan Supreme Court denying its Application For Leave To Appeal the opinion and judgment of the Michigan Court of Appeals.

Respectfully submitted,

MURRAY & PAWLOWSKI

By: /s/ GEORGE E. PAWLOWSKI (P18728) *

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Dated: December 12, 1989

APPENDICES TO PETITION FOR CERTIORARI

• • •
APPENDIX A

OPINION

REPRODUCED AT 178 MICH APP 249; 443 NW2d 390 (1989)

(State of Michigan — Court of Appeals)

(Submitted November 8, 1988; Decided February 28, 1989)

(BUCKLEY LAND CORPORATION v DEPARTMENT OF
NATURAL RESOURCES — Docket No. 103854)

Before: MACKENZIE, P.J.,
and WEAVER and E. A. QUINNELL,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition in favor of defendant. We affirm.

Because plaintiff's issues concerning collateral estoppel, laches, adverse possession and perfection of title were not addressed by the trial court, we do not address them on appeal. *Joe Dwyer, Inc v Jaguar Cars, Inc*, 167 Mich App 672, 685; 423 NW2d 311 (1988).

We disagree with plaintiff's argument that the trial court erroneously granted summary disposition on the basis that plaintiff's suit was barred by the statute of limitations. Under current Michigan law it is true that notice of a tax sale is constitutionally defective if merely given by publication in the county where the property is situated and that tax deeds issuing from defective tax sales are deemed void. *Dow v Michigan*, 396 Mich 192, 208-212; 240 NW2d 450 (1976); *Detroit v*

* Circuit judge, sitting on the Court of Appeals by assignment.

John J Blake Realty Co, 144 Mich App 432, 437; 376 NW2d 114 (1984). However, this was not so at the time of sale to the State of Michigan, and the county-publication notice procedures then in use were subsequently validated by the Michigan Supreme Court in *Golden v Auditor General*, 373 Mich 664; 131 NW2d 55 (1964).

The land at issue was sold for unpaid property taxes in 1940 and purchased by the State of Michigan in 1942. The state complied with existing procedures for the tax sales, which procedures were deemed proper until *Golden, supra* was overruled by *Dow, supra*, some thirty-four years after the tax sales occurred. Because the tax deeds of 1942 were prima facie valid, the ten-year limitation period began running at that time. MCL 600.5801; MSA 27A.5801. See also *Fitschen v Olson*, 155 Mich 320, 323-324; 119 NW 3 (1909). Upon completion of the ten-year period, the state's title was no longer open to question. See *Toll v Wright*, 37 Mich 93 (1877).

Michigan favors only limited retroactivity when overruling prior law, the retroactive effect of a decision generally being limited to parties before the court and to pending cases. *Tebo v Havlik*, 418 Mich 350, 360-361; 343 NW2d 181 (1984), reh den 419 Mich 1201 (1984). See also Moody, *Retroactive Application of Law-Changing Decisions in Michigan*, 28 Wayne Law Review 439, 508 (1982). Reliance on an old rule, as occurred here, is a strong factor favoring limited retroactivity of an overruling decision. 418 Mich 362-363. In light of the state's proper application of existing notice procedures, exhaustion of the limitation period in 1952, and the Michigan Supreme Court's declaration of procedural validity in 1964, it would be unreasonable to retroactively apply the later ruling in *Dow, supra*, some

thirty-four years after the fact of a valid sale, twenty-four years after the limitations period had run, and twelve years after the declaration of procedural validity.

Therefore we find that the trial court properly granted defendant's motion for summary disposition on grounds that plaintiff's action was barred by the statute of limitations, MCL 600.5801; MSA 27A.5801.

Affirmed.



APPENDIX B

**TRANSCRIPT OF INGHAM COUNTY CIRCUIT COURT
OPINION AND CONCLUSIONS**

(State of Michigan — Circuit Court — County of Ingham)

(Proceedings of September 14, 1987)

(BUCKLEY LAND CORPORATION, Plaintiff, -vs- DEPARTMENT OF NATURAL RESOURCES, a department of the State of Michigan, Defendant — File No. 85-54849-CZ; Motions for Summary Disposition)

Proceedings had in the above-entitled cause before the HON. PETER D. HOUK, Circuit Judge, at Mason, Michigan, on September 14, 1987.

APPEARANCES: STEVEN L. MAAS, Esq., 300 McKay Tower, Grand Rapids, Michigan 48503, Appearing in behalf of Plaintiff; MICHAEL C. McDANIEL, Assistant Attorney General, 401 South Washington Avenue, Plaza One — Third Floor, Lansing, Michigan 48913, Appearing in behalf of Defendant.

* * *

(17) * * * THE COURT: As counsel have both noted, the Court has reviewed these briefs quite extensively, and I appreciate not only the briefs but the exhibits that have been put together by Plaintiff in this matter. I think it's made the job of this Court significantly easier. Let me begin with the surprisingly-unaddressed question today and that is the question of jurisdiction in this matter. I believe the Court's spent almost as much time playing with that issue in the last three days as it has with the other issues that have been raised by this lawsuit.

I find that this Court sitting as an Ingham County (18) Circuit Court does have jurisdiction in this matter. The quiet-title action unquestionably could have been brought in the Circuit Court, and I believe that Dean versus DNR, 399 Michigan 84, is sufficient authority for the maintenance of the unjust enrichment claims in this court as well. However, the Court does find that this action is time-barred and that more than 10 years has elapsed since the property was deeded to the Plaintiff in this matter.

The Court reaches its decision based upon the following reasoning: In Golden versus the Auditor General, 373 Michigan 664, and in Longyear versus Toolan, 209 United States 414, a 1908 decision, both approved at their respective times the constitutionality of the 1893 Tax Sale Act. Therefore, at the time that the deeds in question here were transferred to the Plaintiff, for at least 25 years prior to that time the tax sale had been declared by the courts of competent jurisdiction to be constitutional.

Plaintiffs here claim title from the beneficiary of the dissolved trust that it failed to pay the taxes on the property for more than three decades. The quit-claim deeds here, and I think it's significant that they are in fact quit-claim deeds. Each recite that they were given in exchange for, quote, "full consideration of one dollar." They are further limited beyond their quit-claim status by the endorsement that they convey only such interest as the (19) estate owned. From this the Court concludes that Plaintiff Buckley Land Corporation has no independent rights and that it took with notice.

What interest then did the beneficiaries have? Well, for over 30 years the taxes have remained unpaid on these properties. As recently as seven years prior to the transfer of the property — and I'm talking now the transfer of the property from the beneficiaries to

Buckley — at least as recently as seven years prior to that time our State Supreme Court said that the tax sale mechanism was constitutional in the Golden case. In short, there is nothing that would indicate that the beneficiaries believed that they had a viable interest.

In terms of the Tebo versus Haylik, decision, 418 Michigan 350, which this Court finds to be the most current and correct statement of the law on retroactivity in this state, there's no reason to give full retroactivity to the Dow decision. Stated positively, there was a reliance on the rule as set forth in Golden and in Longyear. There are vested property rights here. Some of the property has been exchanged with the federal government, other parcels have been sold off. Some of it has been developed. Some may very well have been left in its original state. There will be a substantial impact upon the State and other governmental agencies if this Court were to give full retroactivity to the (20) Dow decision.

The Court has not taken the opportunity to go through and tally up, nor did apparently either party, I kept looking for it, the total amount of acreage involved here, but I dare say it's several thousand acres. Is that correct, Counsel?

MR. MAAS: Approximately 22,000 acres of which 15,000 approximately still remain with the State.

THE COURT: So there's going to be a substantial impact not only in terms of the day-to-day operation of the various governmental Clerks, Register of Deeds offices, but as well in terms of the future development of the state park lands. And as counsel has suggested here today, *lis pendens* which affect the viability of development of mineral rights within the state. So, the Court finds from that that there is a substantial impact on governmental offices and the potential for, frankly,

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unfettered chaos in terms of private claims and development from the state's natural resources.

So, for those reasons the Court will grant the Defendant's Motion for Summary Disposition in this matter and deny Plaintiff's. Anything further, Counsel?

* * *

APPENDIX C

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND DENYING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

(State of Michigan — Circuit Court — County of Ingham)

(Entered September 28, 1987)

(BUCKLEY LAND CORPORATION, Plaintiff, v DEPARTMENT OF NATURAL RESOURCES, a Department of the State of Michigan, Defendant — No. 85-54849-CZ; HON. PETER D. HOUK)

At a session of said Court held in its courtroom in the City of Mason, County of Ingham, State of Michigan, on the 28 day of September, 1987.

PRESENT: Honorable Peter D. Houk,
Circuit Judge.

This matter having come before the Court on cross-motions for Summary Disposition, the Court having thoroughly read all briefs filed in this matter, having reviewed all previous pleadings and the exhibits attached to the Motions for Summary Disposition, heard testimony of all parties and being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Defendant's Motion for Summary Disposition is GRANTED and Plaintiff's Motion for Summary Disposition is DENIED, for the reasons stated on the record at the hearing of this matter on September 14, 1987.

IT IS FURTHER ORDERED that this Order is the final disposition of these matters between the parties with

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prejudice and applies to all parcels of real property at issue herein, a list of which is attached hereto.

IT IS SO ORDERED.

/s/ PETER D. HOUK
Circuit Judge

(Certification Omitted)

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APPENDIX D

ORDER

(State of Michigan — Supreme Court)

(Entered September 26, 1989)

(BUCKLEY LAND CORPORATION, Plaintiff-Appellant,
v DEPARTMENT OF NATURAL RESOURCES, a Depart-
ment of the State of Michigan, Defendant-Appellee —
SC: 85703; COA: 103854; LC: 85-54849-CZ)

Dorothy Comstock Riley, Chief Justice; Charles L.
Levin, James H. Brickley, Michael F. Cavanagh,
Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin,
Associate Justices.

On order of the Court, the application for leave to
appeal is considered, and it is DENIED, because we are
not persuaded that the questions presented should be
reviewed by this Court.

(Certification Omitted)



APPENDIX E

MICHIGAN STATUTORY PROVISIONS INVOLVED:

1. 1893 PA 206, § 61a; MCLA 211.61a; MSA 7.106
2. 1893 PA 206, § 66; MCLA 211.66; MSA 7.111
3. 1893 PA 206, § 73c; MCLA 211.73c; MSA 7.119(2)
4. 1903 PA 84, § 1; MCLA 211.431; MSA 7.661
5. 1961 PA 236, § 5801; MCLA 600.5801; MSA 27A.5801

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1. 1893 PA 206, § 61a; MCLA 211.61a; MSA 7.106

211.61a. Notice to taxpayer, treasurer to mail, form; expenses

Sec. 61a. As soon as the state treasurer's petition, with a list of delinquent tax lands is filed with the county clerk under section 61¹ and not less than 30 days before the date fixed for the annual tax sale, the county treasurer of each county in this state shall notify such persons, according to the records of his office, each piece or parcel of land upon which taxes are then delinquent, and which are subject to sale at the next ensuing annual tax sale by mailing to the last known address of those persons, a notice in substantially the form prescribed below. The notice shall be sent by first class mail, address correction requested, to each person, directed to his last known post office address with postage fully prepaid thereon:

Office of the county treasurer
of _____ county, Michigan.

Sir:

You are hereby notified that the annual tax sale of lands for delinquent taxes of 19____, and prior

¹ Section 211.61.

years for the county of _____, will be made at the county treasurer's office of said county at the county seat of said county, on the ____ day of May, 19____. According to the records of this office the following described lands are assessed to you and certain years' taxes thereon appear to be unpaid as stated below.

Description of land: _____

Amount of delinquent taxes unpaid for the year 19____, \$ _____. If the taxes on the above mentioned lands are not paid prior to the date upon which said sale is to be held, then said lands will be sold for the taxes above stated. Any person with an interest in this land has a right to be heard at the circuit court hearing authorizing the tax sale. This hearing will be held on the ____ day of _____, 19____, at ____ (time), at _____ (place of hearing). To be heard, you must file written objections in advance, as provided by law.

Very truly yours,

County Treasurer.

At the time the state treasurer forwards his petition to the county clerk of each county, he shall also send to the county treasurer of each county in this state, a sufficient number of printed forms to enable the county treasurer to notify the owners of all lands included in the petition in accordance with this section. The cost of mailing the notices shall be paid to the county treasurer out of the general or contingent fund of each county on allowance by the county board of commissioners or board of county auditors. Failure to receive or serve the notice shall not invalidate the proceedings taken under the state treasurer's petition and decree of the circuit court, in foreclosure and sale of the lands for taxes.

2. 1893 PA 206, § 66; MCLA 211.66; MSA 7.111**211.66. Publication of petition and order for hearing; jurisdiction, objections, hearing, evidence; order setting aside taxes; decree**

Sec. 66. The auditor general shall cause a copy of the order and a copy of the petition to be published once in each week for 3 consecutive weeks preceding the time fixed for the hearing thereof, in some regularly established newspaper in the county where such petition is filed, to be selected by the auditor general. The order and petition shall both be published in the same newspaper, the order immediately preceding the petition: Provided, In such petition it shall be sufficient to print against each parcel the years for which delinquent and the total of taxes, interest and charges due in said years. The cost of such publication shall be paid by the state. The proprietor of such newspaper shall furnish the proper county treasurer, not to exceed 300 copies of such publication, 10 such copies to each city and village clerk and township supervisor, and 2 such copies to the auditor general, and the auditor general and county treasurer shall carefully examine the notices published and see that they are correct. The term 3 consecutive weeks means 3 publications and the dates of the publications shall be specified by the auditor general. Any person familiar with the facts may make an affidavit as to the publication required. The auditor general shall not pay for any such publication until satisfied that it has been made according to law. The publication of the order and petition aforesaid shall be equivalent to a personal service of notice on all persons who are interested in the lands specified in such petition, of the filing thereof, of all proceedings thereon and on the sale of the lands under the decree, and shall give the court jurisdiction to hear such petition, deter-

mine all questions arising thereon, and to decree a sale of such lands for the payment of all taxes, interest and charges thereon. The circuit court in chancery shall have jurisdiction to hear, try and determine the matters alleged in such petition, even though the amount involved therein be less than \$100.00. It shall be the duty of the prosecuting attorney to prosecute all such proceedings on the part of the state. If he shall refuse, neglect or be unable to do so, the court shall appoint some competent person to take charge of and prosecute the same, who shall be paid by the county. The board of supervisors may employ some competent person to prosecute such proceedings or assist therein. Proof of the publication of the order and petition herein required shall be filed in both the office of the county clerk and auditor general before any final order is made. Proof of the filing of such affidavit of publication in the office of the auditor general may be made by affidavit of the auditor general, or his deputy. Any person having any interest in the lands or any portion thereof included or referred to in said petition desiring to contest the validity of any tax shall file in writing his objections thereto with the clerk of the county in which said lands are advertised for sale and serve a copy thereof on the prosecuting attorney of the county, and the auditor general, and the county, city, village, township and school district, the validity of the taxes of which are contested, and file proof of such service on or before the day fixed in said notice for the hearing of such petition, and shall not be allowed to make any objections not therein specified. Hearing upon such objections shall not be held until such service has been made and due proof thereof filed. If on the day fixed in such notice for the hearing of such petition or on the day following that day, it shall be made to appear to the court that any person has been prevented from filing

his objections to any tax without any fault on his part, such further time may be granted for that purpose as may seem proper, not exceeding 5 days. The court shall give precedence to the hearing of such petition over all other business, shall examine, consider and determine the matters therein stated and objections made, in a summary manner without other pleadings, and make final decree thereon as the right of the case may be. The taxes specified in the petition shall be presumed to be legal and a decree be made therefor unless the contrary is proved. Evidence shall be taken in open court. All oral testimony shall, at the request of any person interested, be written down and filed. The court may make such orders from time to time as may be necessary to facilitate the proceedings, and shall decide all questions as to the admissibility of evidence, and the decisions so made shall be final and not subject to review or appeal. If the lands of 2 or more persons have been assessed together, the court may, if practicable, separate the same and apportion to each parcel its just proportion of the taxes, interest and charges. If any tax shall be found illegal, such part shall be set aside and the remaining tax shall be decreed valid. The total amount of taxes, interest and charges, as fixed by the court, shall be entered by the register of the court opposite each parcel of land in the column of said record under the heading "amount decreed against lands." If the court shall make any order setting aside the taxes on any parcel of land, or any part thereof, or any special order relating to any particular parcel of land, or taxes thereon, a brief entry of such order shall be made upon said records opposite such land or tax, which shall be signed by the judge of the court, either by his full name or initials, and such entry shall have the same effect as if made and entered as a part of a final decree. At least 10 days prior to the time fixed for the sale of such

lands, the court shall make a final decree in favor of the state of Michigan for the payment of such taxes, interest and charges as shall be valid, and determine the total amount thereof chargeable against each parcel of land, and shall order and decree that unless such payment be made such several parcels of land, or so much of each as may be necessary to satisfy the amount fixed by such decree, shall severally be sold as the law directs. Such decree shall be considered as a several decree in favor of the state of Michigan against each parcel of land for each tax included therein. The court may decree such costs against a person contesting any tax as may be equitable, if the tax, or any part thereof which remains unpaid, be adjudged valid. In the absence from the file of proper affidavit of publication as required by this section, secondary evidence of such publication and of the due filing of such affidavit shall be admissible: Provided, That according to the calendar entry of the clerk of such court an affidavit of publication was filed. The affidavit of such publication filed in the office of the auditor general shall be admissible as secondary evidence.

3. 1983 PA 206, § 73c; MCLA 211.73c; MSA 7.119(2)

211.73c. Redemption; notice to owner of expiration of period; form

Sec. 73c. (1) Not later than 120 days before the expiration of the redemption period provided in section 74 ¹, the county treasurer of each county shall send a notice to each person who, according to the records of his office, has an interest in a

¹ Section 211.74.

piece or parcel of land offered at the tax sale provided in section 70² of this act, and not yet redeemed. The county treasurer shall also send notice to all other persons shown by the records of the local assessing officer or local treasurer to have an interest in those lands.

- (2) On all parcels for which an address is known, the notice shall also be mailed by regular mail addressed to "occupant" if any of the following apply:
 - (a) A prior notice has not been sent to that address.
 - (b) A prior notice sent to that address has been forwarded or returned as undeliverable, except as provided in subsection (3).
- (3) Certified mail notices returned as "undeliverable - unclaimed" shall be remailed by first class mail.
- (4) The notice to those persons shall be in substantially the form prescribed below. On parcels bid off to the state and still a state bid, the notice shall be sent by certified mail with return receipt demanded, with postage fully prepaid. On all other parcels not redeemed, the notice shall be sent by first class mail, address correction requested.

Sir:

You are hereby notified that according to the records of this office, the following piece or parcel of land, which you may have an interest in, was sold at the annual tax sale of May, 19__, for delinquent taxes of 19__, and prior years. Unless redeemed from said sale on or before ____ 19__, the title to said land will vest and become absolute in the state of Mich-

² Section 211.70.

igan or if the taxes were paid by a private tax lien buyer, a tax deed will be issued by the state of Michigan entitling the buyer to collect all taxes paid plus a 50% penalty and other fees.

Very truly yours,

County Treasurer or
Assessor of _____

- (5) The cost of mailing the notice herein provided for shall be paid to the county treasurer by the county.
- (6) Failure to receive or serve the notice or a defect in the notice shall not invalidate the proceedings taken under the auditor general's petition and decree of the circuit court, in foreclosure and sale of the lands for taxes.

4. 1903 PA 84, § 1; MCLA 211.431; MSA 7.661

211.431. Deeds to state; title absolute; executed deeds

Sec. 1. After the expiration of 6 months from and after the time when any deed made to the state under the provisions of section 127¹ or section 67a² of Act 206 of the Public Acts of 1893, being the general tax law, and acts amendatory thereto, shall have been recorded in the office of the register of deeds for the county in which the land so deeded shall be situated, the title of the state in and to the same shall be deemed to be absolute and complete, and no suit or proceeding shall thereafter be instituted by any person claiming through the original or government title to set

¹ Repealed by P.A.1941, No. 234. See, now, § 211.67a.

² Section 211.67a.

aside, vacate or annul the said deed or the title derived thereunder: Provided, That as to all lands heretofore deeded to the state under the provisions of said section 67a of said Act 206 of the Public Acts of 1893, the title of the state thereto shall be deemed to be absolute and complete after a period of 6 months from the taking effect of this act, and no suit or proceeding shall thereafter be instituted by any person claiming through the original or government title to set aside, vacate or annul said deed or deeds or the title derived thereunder.

5. 1961 PA 236, § 5801; MCLA 600.5801; MSA 27A.5801

600.5801. Limitation of real actions; periods

Sec. 5801. No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.

- (1) **Defendant claiming title under fiduciary's deed or court-ordered sale.** When the defendant claims title to the land in question by or through some deed made upon the sale of the premises by an executor, administrator, guardian, or testamentary trustee; or by a sheriff or other proper ministerial officer under the order, judgment, process, or decree of a court or legal tribunal of competent jurisdiction within this state, or by a sheriff upon a mortgage foreclosure sale the period of limitation is 5 years.

- (2) **Defendant claiming title under tax deed.** When the defendant claims title under some deed made by an officer of this state or of the United States who is authorized to make deeds upon the sale of lands for taxes assessed and levied within this state the period of limitation is 10 years.
- (3) **Defendant claiming title under will.** When the defendant claims title through a devise in any will, the period of limitation is 15 years after the probate of the will in this state.
- (4) **Other cases.** In all other cases under this section, the period of limitation is 15 years.

P.A.1961, No. 236, § 5801, Eff. Jan. 1, 1963.

APPENDIX F

**EXCERPTS FROM THE RECORD
RAISING THE CONSTITUTIONAL QUESTIONS:**

- 1. COMPLAINT TO QUIET TITLE**
- 2. AMENDED COMPLAINT TO QUIET TITLE**
- 3. PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION & BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION SUBMITTED TO THE INGHAM COUNTY CIRCUIT COURT**
- 4. BRIEF OF PLAINTIFF-APPELLANT BUCKLEY LAND CORPORATION SUBMITTED TO THE MICHIGAN COURT OF APPEALS**
- 5. PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL SUBMITTED TO THE MICHIGAN SUPREME COURT**
- 6. BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL SUBMITTED TO THE MICHIGAN SUPREME COURT**

1. COMPLAINT TO QUIET TITLE

* * *

9. That with respect to the aforementioned judicial proceedings, tax sale and redemption period, the State of Michigan did not provide Plaintiff's predecessor in title with adequate notice reasonably calculated to apprise it of these various proceedings and rights, all of which was contrary to US Const. Am XIV; Const 1963, Article I, § 17 in that Plaintiff was denied constitutionally protected due process of law.

10. That by virtue of the deprivation of Plaintiff's constitutional right to adequate notice and opportunity to be heard, the circuit courts for the various counties

entering the judgments of tax foreclosures as above stated were without jurisdiction.

11. That Public Act 206 of 1893 as herein complained of was declared unconstitutional by the Supreme Court of this State for the reasons alleged in this Complaint in *Dow v State of Michigan*, 396 Mich 192 (1976).

* * *

2. AMENDED COMPLAINT TO QUIET TITLE

* * *

9. That with respect to the aforementioned judicial proceedings, tax sale and redemption period, the State of Michigan did not provide Plaintiff's predecessor in title with adequate notice reasonably calculated to apprise it of these various proceedings and rights, all of which was contrary to US Const. Am XIV; Const 1963, Article I, § 17 in that Plaintiff was denied constitutionally protected due process of law.

10. That by virtue of the deprivation of Plaintiff's constitutional right to adequate notice and opportunity to be heard, the circuit courts for the various counties entering the judgments of tax foreclosures as above stated were without jurisdiction.

11. That Public Act 206 of 1893 as herein complained of was declared unconstitutional by the Supreme Court of this State for the reasons alleged in this Complaint in *Dow v State of Michigan*, 396 Mich 192 (1976). Further, the principles and requirements of *Dow, supra*, (sic) have in certain cases been given retroactive application by the Michigan Court of Appeals.

* * *

3. PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION
& BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR
SUMMARY DISPOSITION AND IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY DISPOSI-
TION SUBMITTED TO THE INGHAM COUNTY CIR-
CUIT COURT

* * *

The only notice given regarding these tax sales was by publication in local newspapers located in the counties where the real property is situated. The Michigan Supreme Court held such notice constitutionally inadequate in *Dow v State of Michigan*, 396 Mich 192; 240 NW2d 450 (1976).

(On page 2 of Plaintiff's Motion For Summary Disposition).

* * *

(a) The Michigan Supreme Court held in *Dow v State of Michigan*, 396 Mich 192; 240 NW2d 450 (1976), that notice by publication of tax sales is constitutionally defective and violates principles of due process. This holding was given fully retroactive effect in *Fladger v Detroit Non-Profit Housing Corp*, (CA No 25642; 11/29/76) (a copy of which is attached as Exhibit 12)[†] to tax sales occurring before the Michigan Supreme Court's decision in *Dow, supra*. Because the Michigan Supreme Court in *Dow, supra*, held that the statute allowing notice by publication in tax sales was unconstitutional, the general rule set forth by the Michigan Supreme Court in *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135; 253 NW2d 114 (1977) and by the Michigan Court of Appeals in *Faigenbaum v Oakland Medical Center*, 143 Mich App 303; 373

[†] [Printer's Note: Exhibit 12 omitted in reproducing this excerpt.]

NW2d 161 (1985); *Old Reliable Fire Ins Co v Schaub*, 85 Mich App 294; 271 NW2d 206 (1978), and *Herrick v Taylor*, 113 Mich App 370; 317 NW2d 631 (1982) that an unconstitutional statute is void *ab initio* and an overruling case is to be given full retroactive effect is applicable to the present controversy and the principles of *Dow, supra*, are relevant to the tax sales in question.

(On pages 5-6 of Plaintiff's Motion For Summary Disposition).

* * *

Further, in *Dow, supra*, the Michigan Supreme Court allowed the plaintiffs' claim even though the statutory redemption period had expired. Thus, in the present controversy, Defendant's argument that Plaintiff Buckley Land Corporation's claims are barred because of failing to redeem the property within the statutory redemption period must fail.

The condemned procedure of mere publication is the very procedure by which these present plaintiffs lost their property rights to the State of Michigan. This was in violation of the Due Process Clause of the United States and Michigan Constitution, US Const. Am XIV; Const 1963, art 1, § 17.

(On page 8 of Brief In Support Of Plaintiff's Motion For Summary Disposition And In Opposition To Defendant's Motion For Summary Disposition).

* * *

Further, the judgments involved in the present dispute are invalid because of constitutionally infirm notice, and as the Court of Appeals stated in *Detroit Automobile Inter-Insurance Exchange v Maurizio*, 129 Mich App 166; 341 NW2d 262 (1983):

"A judgment which is void may be attacked at any time.

'Relief must be granted if the judgment is void, and there is no time limit on attacking a void judgment.' 3 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 185. See also, *In re Adrianson*, 105 Mich App 306, 307; 306 NW2d 487 (1981)." At page 171.

(On page 31 of Brief In Support Of Plaintiff's Motion For Summary Disposition And In Opposition To Defendant's Motion For Summary Disposition).

* * *

It is likely that no statute of limitations applies under the facts of the present controversy.

(On page 31 of Brief In Support Of Plaintiff's Motion For Summary Disposition And In Opposition To Defendant's Motion For Summary Disposition).

* * *

Thus, there is a serious question in the present controversy if the Defendant may even claim that any statute of limitations has run on Plaintiff's claim in light of the fact that there was constitutionally inadequate notice of the tax sales and the right of redemption.

(On page 32 of Brief In Support Of Plaintiff's Motion For Summary Disposition And In Opposition To Defendant's Motion For Summary Disposition).

* * *

Although the United States Supreme Court stated that it did not intimate any view on the issue of

whether constitutionally infirm notice of tax sale proceedings would preclude the running of the period for adverse land claims, the Court's reference to *Schroeder, supra*, shows that if the Court would have addressed the issue, it would have decided that lack of constitutionally adequate notice of tax sale proceedings would have precluded the running of the period for adverse land claims.

In short, the doctrine of adverse possession does not apply, as a matter of law, where there has been constitutionally infirm notice of tax sale proceedings. The rationale is the same as that behind the reason for refusing to use the statute of limitations to bar a claim by a property owner where property has been taken under procedures which are constitutionally infirm and, thus, where the judgment under which the property was taken is void.

(On page 37 of Brief In Support Of Plaintiff's Motion For Summary Disposition And In Opposition To Defendant's Motion For Summary Disposition).

* * *

In *Dow v State of Michigan, supra*, the Michigan Supreme Court held that notice by publication in tax foreclosure proceedings and the lack of notice of the right of redemption was constitutionally infirm, and as shown by *Fladger, supra*, the holding in *Dow, supra*, must be given full retroactive effect.

(On page 44 of Brief In Support Of Plaintiff's Motion For Summary Disposition And In Opposition To Defendant's Motion For Summary Disposition).

* * *

Plaintiff's claims are not barred by any statute of limitations because as set forth in *Dow, supra*, the statutory redemption period in tax sale cases is inapplicable where notice of the tax sale proceeding is constitutionally inadequate and the property which is the subject of a quiet title action is still held by the State of Michigan and the rights of third parties have not intervened. Further, the United States Supreme Court in *Paschall, supra*, has implied that in tax sale cases, the lack of constitutionally required notice will preclude the application of any statute of limitations. Further, Plaintiff submits that if the general 10-year statute of limitations regarding real property does apply, this period did not begin to run with respect to Plaintiff's claims until the day the Michigan Supreme Court issued its Opinion in *Dow, supra*, which removed the statutory and prior case law impediments to challenging tax sales on constitutional grounds. Accordingly, only claims brought before April 1, 1986 (10 years after the decision in *Dow, supra*) would be timely.

(On page 45 of Brief In Support Of Plaintiff's Motion For Summary Disposition And In Opposition To Defendant's Motion For Summary Disposition).

* * *

4. BRIEF OF PLAINTIFF-APPELLANT BUCKLEY LAND CORPORATION SUBMITTED TO THE MICHIGAN COURT OF APPEALS

* * *

4. During the tax sales of 1938 and subsequent years, much of the property held by the Edward Buckley

Trust was sold for unpaid taxes and was bid into the State of Michigan. (See Motion Exhibit 5).

5. The only notice given regarding these tax sales was by publication in local newspapers located in the counties where the real property is situated. The Michigan Supreme Court held such notice constitutionally inadequate in *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976).

(On page 2)

* * *

The condemned procedure of mere publication is the very procedure by which the present Plaintiff-Appellant's predecessors lost their property rights to the State of Michigan. This was in violation of the Due Process Clause of the United States and Michigan Constitution, US Const, Am XIV; Const 1963, art 1, § 17.

(On page 12)

* * *

As set forth more fully in Section IV of this brief, retroactive application of *Dow, supra*, to the present case would not cause "chaos" or open the floodgates of tax deed litigation because it is possible that only those who filed suit on or before April 1, 1986, are entitled to attack pre-*Dow* tax sales on the basis of constitutionally infirm notice.

(On page 26)

* * *

Further, the judgments involved in the present dispute are invalid because of constitutionally infirm notice, and as the Court of Appeals stated in *Detroit*

Automobile Inter-Insurance Exchange v Maurizio, 129 Mich App 166, 341 NW2d 262 (1983):

"A judgment which is void may be attacked at any time.

'Relief must be granted if the judgment is void, and there is no time limit on attacking a void judgment.' 3 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 185. See also, *In re Adrianson*, 105 Mich App 306, 307; 306 NW2d 487 (1981)." At page 171.

(On pages 37-38)

* * *

It is likely that no statute of limitations applies under the facts of the present controversy.

(On page 38)

* * *

Thus, there is a serious question in the present controversy if Defendant-Appellee may even claim that any statute of limitations has run on Plaintiff-Appellant's claim in light of the fact that there was constitutionally inadequate notice of the tax sales and the right of redemption.

(On page 39)

* * *

Thus, this Honorable Court will not open the flood-gates of tax deed litigation by retroactively applying the holding in *Dow, supra*, because probably only those who have filed suit on or before April 1, 1986 are en-

titled to attack pre-*Dow* sales based on the ground of constitutionally infirm notice.

(On page 42)

* * *

In short, the doctrine of adverse possession does not apply, as a matter of law, where there has been constitutionally infirm notice of tax sale proceedings. The rationale is the same as that behind the reason for refusing to use the statute of limitations to bar a claim by a property owner where property has been taken under procedures which are constitutionally infirm and, thus, where the judgment under which the property was taken is void.

(On page 44)

* * *

In *Dow v Michigan, supra*, the Michigan Supreme Court held that notice by publication in tax foreclosure proceedings and the lack of notice of the right of redemption was constitutionally infirm, and as shown by *Fladger, supra*, the holding in *Dow, supra*, must be given full retroactive effect.

(On page 46)

* * *

Plaintiff-Appellant's claims are not barred by any statute of limitations because as set forth in *Dow, supra*, the statutory redemption period in tax sale cases is inapplicable where notice of the tax sale proceeding is constitutionally inadequate and the property which is the subject of a quiet title action is still held by the State of Michigan and the rights of third parties have not intervened. Further, the United States Supreme

Court in *Paschall, supra*, has implied that in tax sale cases, the lack of constitutionally required notice will preclude the application of any statute of limitations. Further, Plaintiff-Appellant submits that if the general 10-year statute of limitations regarding real property does apply, this period did not begin to run with respect to Plaintiff-Appellant's claims until the day the Michigan Supreme Court issued its Opinion in *Dow, supra*, which removed the statutory and prior case law impediments to challenging tax sales on constitutional grounds. Accordingly, only claims brought before April 1, 1986 (10 years after the decision in *Dow, supra*) would be timely.

(On page 47)

* * *

5. PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL SUBMITTED TO THE MICHIGAN SUPREME COURT

* * *

2. As set forth in the Brief In Support Of Plaintiff-Appellant's Application For Leave To Appeal, there is no dispute that the method of taking the property involved in this case was unconstitutional under the principles of *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976). This case involves legal principles of major significance to the state's jurisprudence because it involves the retroactive application of *Dow, supra*, and the extent to which this unconstitutional taking and unjust enrichment to our government will be remedied. See MCR 7.302(B)(3).

3. As shown in the Brief In Support Of Plaintiff-Appellant's Application For Leave To Appeal, the decision by the Court of Appeals in this case appears to be in conflict with *Fladger v Detroit Non-Profit Housing Corp*, unpublished opinion of the Court of Appeals decided November 29, 1976 (Docket No. 25642), and with the principles of retroactivity in situations where a statute is found unconstitutional as in *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135; 253 NW2d 114 (1977), and *Herrick v Taylor*, 113 Mich App 370; 317 NW2d 631 (1982). See MCR 7.302(B)(5).

* * *

6. BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL SUBMITTED TO THE MICHIGAN SUPREME COURT

* * *

5. The only notice given regarding these tax sales was by publication in local newspapers located in the counties where the real property is situated. The Michigan Supreme Court held such notice constitutionally inadequate in *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976).

(On page 2)

* * *

Michigan's provision for notice by publication in tax sale proceedings was sustained against a due process challenge by the United States Supreme Court in *Longyear v Toolan*, 209 US 414; 28 S Ct 506; 52 L Ed 859 (1908), and by the Michigan Supreme Court in *Golden v Auditor General*, 373 Mich 664; 131 NW2d 55 (1964).

In 1976, however, the Michigan Supreme Court changed its position with *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976) and held that the Due Process Clauses of the Michigan and United States Constitutions require an owner of a significant property interest to be given proper notice and an opportunity for a hearing. The Court held that newspaper publication was constitutionally inadequate . . .

(On page 7)

* * *

The condemned procedure of mere publication is the very procedure by which the present Plaintiff-Appellant's predecessors lost their property rights to the State of Michigan. This violated the Due Process Clause of the United States and Michigan Constitution, US Const, Am XIV, Const 1963, art 1, § 17.

(On page 8)

* * *

It is undisputed that under current case law mere publication of a notice of hearing and the right of redemption relative to tax sales is constitutionally inadequate. The question next is what effect the holding in *Dow, supra*, has on the tax sales regarding the property involved in the present dispute.

(On page 8)

* * *

The general rule in Michigan is that overruling decisions are given full retroactive effect. In *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135; 253 NW2d 114 (1977), the Michigan Supreme Court addressed the retroactive effect of *Gallegos v Glasser*

Crandell Co, 388 Mich 654; 202 NW2d 786 (1972) and stated:

"It is a general rule of statutory interpretation that an unconstitutional statute is void ab initio."

(On page 9)

* * *

In *Dow, supra*, the Court in reality held that MCLA 211.61a; MSA 7.106 and MCLA 211.73c; MSA 7.119(2) (the statutes which state that failure to send or receive notice of tax sale proceedings and the right of redemption does not invalidate proceedings taken under the Auditor General's petition or any subsequent decree of sale) are unconstitutional.

(On page 10)

* * *

Thus, where a case declares a statutory provision unconstitutional, the only factor which should warrant anything other than full retroactive application of the decision is the effect of full retroactivity on the administration of justice.

Even in cases where a claim has accrued but the plaintiff has not filed suit by the time an appellate Court declares a statute unconstitutional which previously eliminated the cause of action, the case will be applied retroactively. See *Old Reliable Fire Ins Co v Schaub*, 85 Mich App 294; 271 NW2d 206 (1978).

(On page 11)

* * *

Because *Dow, supra*, has been applied retroactively, it should be applied to the present case. The failure of the Court of Appeals to do so appears to present a conflict with *Fladger, supra*.

(On page 14)

* * *

In *Paschall v Christie-Stewart, Inc*, 414 US 100; 94 S Ct 313; 38 L Ed 2d 298 (1973), the United States Supreme Court ruled on a case where it had noted probable jurisdiction to consider whether the published notice provisions of the Oklahoma tax sale statutes comported with due process of law under the Fourteenth Amendment. The Supreme Court found, however, that the running of the Oklahoma period for adverse claims might have been an independent ground for the judgment in the state trial court, and if so, the Court's decision would be advisory and beyond its jurisdiction.

Thus, the Court remanded the case to the Supreme Court of Oklahoma to consider whether the appellants preserved the right to challenge the trial court's determination that the Oklahoma statute of limitations barred their claim, and if so, whether under state law the statute of limitations barred the appellants' claim irrespective of the constitutional adequacy of the tax sale notice provisions. Interestingly, though, the United States Supreme Court stated in a footnote:

"Whether the alleged lack of constitutionally valid notice would preclude the running of the statute of limitations for an adverse land claim is a question that has not been presented to this Court or to the Oklahoma courts below. C.f. *Schroeder v City of New York*, 371 U.S. 208, 213-

214 (1962). We intimate no view on this issue."
At 414 US page 102.

In *Schroeder v City of New York*, 371 US 208; 83 S Ct 279; 9 L Ed 2d 255 (1962), such a claim was allowed even though the New York statute of limitations had run.

(On page 15)

* * *

Plaintiff-Appellant's claims, however, did not accrue until the Michigan Supreme Court issued its opinion in *Dow, supra*, which removed the statutory and prior case law impediments to challenging tax sales on constitutional grounds. See *Herrick, supra*. The *Dow* Court issued its opinion on April 1, 1976, and thus, all claims similar to those made by Buckley Land Corporation which were filed after April 1, 1986, might be barred by the 10 year statute of limitations. Buckley Land Corporation, however, filed suit in September of 1985, well before the possible April 1, 1986 deadline. Thus, this Honorable Court will not open the floodgates of tax deed litigation by retroactively applying the holding in *Dow, supra*, because probably only those who have filed suit on or before April 1, 1986 are entitled to attack pre-*Dow* sales based on the ground of constitutionally infirm notice.

(On pages 16-17)

* * *

In *Dow v Michigan, supra*, the Michigan Supreme Court held that notice by publication in tax foreclosure proceedings and the lack of notice of the right of redemption was constitutionally infirm, and as shown by

Fladger, supra, the holding in *Dow, supra*, must be given retroactive effect in the present case.

Buckley Land Corporation's claims are not barred by any statute of limitations because as set forth in *Dow, supra*, the statutory redemption period in tax sale cases is inapplicable where notice of the tax sale proceeding is constitutionally inadequate and the property which is the subject of a quiet title action is still held by the State of Michigan and the rights of third parties have not intervened. Further, the United States Supreme Court in *Paschall, supra*, has implied that in tax sale cases, the lack of constitutionally required notice will preclude applying any statute of limitations. Further, Plaintiff submits that if the general 10-year statute of limitations regarding real property applies, this period did not begin to run with respect to its claims until the day the Michigan Supreme Court issued its Opinion in *Dow, supra*, which removed the statutory and prior case law impediments to challenging tax sales on constitutional grounds. Accordingly, only claims brought before April 1, 1986 (10 years after the decision in *Dow, supra*) would be timely.

There is no dispute that the method of taking the property involved in this case was unconstitutional under the principles of *Dow, supra*, and the case involves the extent to which this unconstitutional taking and unjust enrichment to our government will be remedied.

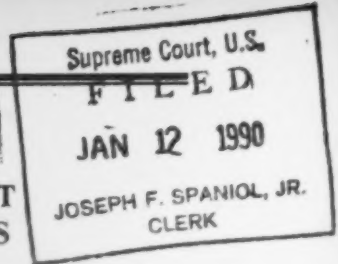
(On pages 17-18)

* * *

No. 89-984

**IN THE SUPREME COURT
OF THE UNITED STATES**

October Term, 1989



BUCKLEY LAND CORPORATION,

Petitioner,

v

**DEPARTMENT OF NATURAL RESOURCES,
a Department of the State of Michigan,**

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether deference should be given to a Michigan Court appellate decision which found that Petitioner's challenge to title to real property held by the State of Michigan under a 1940 tax sale based on a statutory procedure constitutional at the time and found to be unconstitutional in 1976, is circumscribed by the state's rule of limited retroactivity of judicial decision and the statute of limitation?

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OPINIONS BELOW

The Order of the Michigan Supreme Court entered on September 26, 1989, denying Petitioner's Application For Leave To Appeal the opinion of the Michigan Court of Appeals is reported at 433 Mich. 875 (1989), and appears in Petitioner's Appendix D beginning at page D-1.

The opinion of the Michigan Court of Appeals entered on February 28, 1989, in favor of Respondent and affirming the decision of the Ingham County Circuit Court is reported at 178 Mich. App. 249; 443 N.W.2d 390 (1989), and appears in Petitioner's Appendix A, beginning at page A-1. The opinion and conclusions of the Ingham County Circuit Court appear in Petitioner's Appendix B beginning at page B-1. The Order of the Ingham County

Circuit Court entered on September 28, 1987, appears in Petitioner's Appendix C beginning at page C-1 and is not reported.

JURISDICTION

The Michigan Court of Appeals issued its Opinion and Judgment on February 28, 1989 (Petitioner's Appendix A, beginning at page A-1). On March 20, 1989, Petitioner filed an Application for Leave to Appeal with the Michigan Supreme Court. The Supreme Court entered an Order denying the Application on September 26, 1989. The Order is reprinted in Petitioner's Appendix D, beginning at page D-1.

Petitioner asserts that the jurisdiction of this Court to review the Opinion

and Judgment of the Court of Appeals of the State of Michigan is, and can be invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The Michigan statutes involved are set forth in Petitioner's Appendix E beginning at page E-1. They are:

1893 P.A. 206, § 60, et. seq.;
M.C.L. 211.60 et. seq.; M.S.A. 7.104,
et. seq. Michigan General Property
Tax Act

1961 P.A. 236, § 5801;
M.C.L. 600.5801; M.S.A. 27A.5801

STATEMENT OF CASE

Edward Buckley acquired the land at issue, for its timber, by land contract in 1891, at a price of \$7,000.00. Mr. Buckley died on August 27, 1927. All residual real property was transferred to Oscar Larson and Virginia Buckley Cook, Trustees, pursuant to a Manistee County Michigan Probate Court Order Assigning Residue, recorded February 20, 1931.

The property taxes were unpaid in 1937 and previous years and thus, the Auditor General of Michigan submitted a Petition for Sale of Lands to the respective State Circuit Courts on January 17, 1940. Proof of Publication was submitted to the Courts on March 20, 1940. In accordance with the Michigan General Property Tax Act, on April 2, 1940, the

respective Circuit Courts then issued an Order requiring the lands to be sold at auction, and if there be no bidders, to be bid into the State for unpaid taxes and the lien cancelled. Pursuant thereto, the property was bid into the State and a deed from the Auditor General, vesting absolute title in the State, was recorded on the 23rd day of June, 1942.

The properties have been leased on many occasions by the State for the exploration, production and development of oil and gas and have also been used for tourism and outdoor recreation. The lands have greatly increased in value.

On January 12, 1971, the Manistee County Probate Court issued a Supplemental Order of Distribution

dissolving the Buckley estate, and ordering as follows:

- "IT IS, THEREFORE, ORDERED that any right, title and interest of any nature and kind which this estate may have owned on November 30, 1970, the date of termination of the Trust under the Last Will and Testament of Edward Buckley, Deceased, in and to the several parcels of real estate identified and described on the schedule entitled Buckley Real Estate attached hereto, shall be deemed to have passed pursuant to that trust instrument and vested in ownership on that date unto the following beneficiaries: An undivided one-third interest therein unto Harold O. Larson of 1152 Glorietta, Coronado, California; An undivided one-third interest therein unto Edward L. Larson of P.O. Box 1058, Grand Rapids, Michigan; An undivided one-sixth interest therein unto Joan H. Jones of 1515 Normandy, Ann Arbor, Michigan; An undivided one-sixth interest therein unto James L. Howlett of 74 W. Long Lake Road, Bloomfield Hills, Michigan." (emphasis added)

Those heirs and beneficiaries then quit-claimed their interest to the Buckley

Land Corporation (Petitioner herein Plaintiff-Appellant below), on February 1, 1971. The Quit-Claim Deeds of each beneficiary contained the following qualifying language:

"This deed is intended to convey to the grantee whatever interest in the premises may have been owned by the Estate of Edward Buckley, Deceased, and distributed to the Grantor by order of the Manistee County Probate Court dated January 12, 1971, in matter number 269-E."
(emphasis added)

The address given on each Quit-Claim Deed for the Buckley Land Corporation was for the law office of Hartman, Beier, Howlett, McConnell and Googasian, the law firm which drafted the Supplemental Order of Distribution for the estate. Consideration of one dollar was paid by Appellant to each beneficiary in exchange for the quit-claim deed.

This lawsuit was not filed until August 20, 1985, some 14½ years after the property interests passed to Petitioner Buckley Land Corporation.

Respondent generally accepts Petitioner's Statement of the Case, but would supplement as follows: Ingham County Circuit Court in Michigan, the trial court, in issuing its bench opinion, also granted Defendant-Appellee's Motion for Summary Disposition based on Golden v. Auditor General, 373 Mich. 664; 131 N.W.2d 55 (1964) and Longyear v. Toolan, 209 U.S. 414; 28 S.Ct. 506; 52 L. Ed. 2d 859 (1908). The court only refused to give Dow v. State of Michigan, 396 Mich. 192; 240 N.W.2d 450 (1976) full retroactive effect and found that the ten-year statute of limitations, M.C.L.

600.5801; M.S.A. 27A.5801, barred
Petitioner's claim.

On February 28, 1989, the Michigan Court of Appeals affirmed the trial court's decision and found that the claim of Petitioner was barred by the 10-year statute of limitations, under M.C.L. 600.5801; M.S.A. 27A.5801, that the 1942 tax deed were prima facie valid and determined that the statute of limitations began to run at the time of the 1942 tax deeds. Therefore, upon completion of the 10-year period, the State's title was no longer open to question.

Further, the Michigan Court of Appeals agreed with the trial court in applying only limited retroactive effect to the Dow decision. Under Michigan law, limited retroactivity applies to parties

before the court and to pending cases. Tebo v. Havlik, 418 Mich. 350, 360-361; 343 N.W.2d 181 (1984), reh. den. 419 Mich. 1201 (1984). Hence, the Michigan Court of Appeals declined to apply Dow, supra, retroactively to a transaction which occurred over 40 years ago. It is true that under today's standard notice of a tax sale is constitutionally defective if merely given by publication in the county where the property is situated, and tax deeds issuing from defective tax sales are deemed void under Dow, supra. However, that standard did not apply in 1940 at the time of sale to the State of Michigan. In fact, the county-publication notice procedures then in use were validated by the Michigan Supreme Court in 1964. Golden, supra.

On March 20, 1989, Plaintiff-Appellant filed its application for Leave to Appeal, and Brief in Support thereto. On April 11, 1989, Defendant-Appellee filed its Response in Opposition to Leave to Appeal and Brief in Support. The Order of the Michigan Supreme Court was entered on September 26, 1989. In this Order, the Michigan Supreme Court denied Petitioner's Application for Leave to Appeal the opinion and judgment of the Michigan Court of Appeals indicating that the Court was not persuaded that the questions presented should be reviewed by the Court.

REASONS FOR DENYING THE WRIT

I

THE STATUTE OF LIMITATIONS QUESTION
RAISED IN THE PETITION FOR WRIT OF
CERTIORARI DOES NOT PRESENT AN
IMPORTANT FEDERAL CONSTITUTIONAL
QUESTION.

The property at issue reverted to the State in 1940. Notice of tax sale by publication was constitutional at the time of the tax sale. The trial court record shows that the property taxes were not paid in 1937 and have not been paid since 1937. Pursuant to the General Property Tax Act, M.C.L. 211.60, et. seq.; M.S.A. 7.104, et. seq., the property was deeded to the State in 1940. Notice by publication alone was the statutorily prescribed procedure at that time. The constitutionality of notice by publication alone was upheld in 1964. Golden v.

Auditor General, 373 Mich. 664; 131 N.W.2d 55 (1964). Moreover, the procedure was upheld in a decision which preceded the 1940 tax sale. Longyear v. Toolan, 209 U.S. 414; 28 S.Ct. 56; 52 L. Ed. 859 (1908).

The estate of Edward Buckley, which had been created in 1931, was terminated in November of 1970. The real estate was distributed to the remaining beneficiaries in January, 1971. Those beneficiaries quit-claimed any and all interests that they may have had on February 18, 1971, to the Buckley Land Corporation.

It was not until April 1, 1976, that the Michigan Supreme Court decided Dow v. State of Michigan, 396 Mich. 192; 240 N.W.2d 450 (1976), and ruled that notice

by publication alone was insufficient to notify an owner of an interest in real property of an impending tax sale. However, regarding retroactivity, neither Dow, supra, nor any of the subsequent Michigan Court of Appeals cases applying or interpreting Dow, have given the Dow ruling on notice, as a matter of law, complete retroactivity. Here, the Buckley Land Corporation did not bring this suit until August 20, 1985, over 40 years after notice of the tax sale which resulted in the lands being bid into the state.

In addition, as to timeliness, the trial court found as a matter of state law that the action was time-barred and that more than 10 years had elapsed since the property was deeded in this matter.

On the basis of state law, the Michigan Court of Appeals affirmed the trial court and found that the claims of Petitioner were barred by the 10-year statute of limitations found in M.C.L. 600.5801; M.S.A. 27A.5801, and determined that the statute of limitations began to run at the time of the tax deeds in 1942. Buckley Land Corporation v. Department of Natural Resources, 178 Mich. App. 249; 443 N.W.2d 390 (1989).

Petitioner erroneously relies upon Schroeder v. City of New York, 371 U.S. 208; 83 S.Ct. 279; 9 L. Ed. 2d 255 (1962), to support claims that an alleged lack of constitutionally valid notice would preclude the running of the statute of limitations for an adverse possession claim.

Schroeder, supra, involved an attempt by New York City to acquire the right to divert water from a river that flowed through Mrs. Schroeder's land. Notice of the city's acquisition was published in several newspapers with limited circulations and notices were posted on trees along the river. Neither the newspapers nor the notices carried Mrs. Schroeder's name and no notices were posted on her land.

The distinction in the subject case is that notice procedure was constitutional at all pertinent times relevant to this matter. The notice by publication procedure was considered constitutional and valid in 1940 at the time of sale to the State of Michigan based upon Longyear, supra, and the county-

publication notice procedures then in use were subsequently validated by the Michigan Supreme Court in Golden, supra, in 1964, twenty-four years after the time of sale to the State. The United States Supreme Court in Schroeder ruled a New York notice statute to be unconstitutional in response to Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The tax sale at issue in this matter predates Mullane by ten years.

Petitioner has failed to establish that the considerations expressed in United States Supreme Court Rule 10 apply in this case. Petitioner has not raised issues of sufficient significance to federal jurisprudence to warrant granting certiorari. Nor have they raised any important questions of federal

law which would warrant this Court granting the petition of certiorari to the Michigan Supreme Court.

In summary, dual considerations underlie a denial of the writ and is especially true of petitions for review on writ of certiorari to a State court. In this matter, review is sought too late as a matter of the state statute of limitations and the decision is supportable as a matter of State law, and is therefore not subject to review by this Court.

II

THE STATE COURT DECISION RELATIVE TO THE LIMITED RETROACTIVITY OF DOW v. STATE OF MICHIGAN AND THE APPLICABLE STATUTE OF LIMITATIONS WAS PROPER AND SUPPORTABLE AS A MATTER OF STATE LAW AND JURISDICTION, AND THEREFORE THE UNITED STATES SUPREME COURT SHOULD NOT REVIEW THE STATE COURT JUDGMENT.

- A. THE TRIAL COURT AND COURT OF APPEALS CORRECTLY HELD THAT DOW v. MICHIGAN SHOULD BE GIVEN ONLY LIMITED RETROACTIVITY.

Respondent asserted below, and the trial court specifically ruled, that Dow v. State of Michigan, 396 Mich. 192; 240 N.W.2d 450 (1976), should be given limited retroactivity, not full retroactivity, as Petitioner had urged.

The Michigan Supreme Court in Tebo v. Havlik, 418 Mich. 350, (1984); reh. den. 419 Mich. 1201 (1984), set forth the standard for retroactivity in Michigan jurisprudence. The Court specifically

cautioned against the so-called rule of full retroactivity.

The Court stated:

"It is evident that there is no single rule of thumb which can be used to accomplish the maximum of justice in each varying set of the circumstances. The involvement of vested property rights, the magnitude of the impact of decision on public bodies taken without warning or a showing of substantial reliance on the old rule may influence the result."

* * *

"Appreciation of the effect a change in settled law can have has led this Court to favor only limited retroactivity when overruling prior law." Tebo at 360.

From the above-quoted passage, it is evident that, since 1984, contrary to Petitioner's assertion, the Michigan Supreme Court has made it clear that it has NOT embraced full retroactivity.

Instead, the Supreme Court favors limited retroactivity, while considering the issue on an individual case basis. Limited retroactivity is prescribed where:

- a) Vested property rights are involved;
- b) Substantial impact on public bodies will occur;
- c) There is substantial reliance on the old rule (or "justified reliance", see fn 4, 418 Mich. at 363); and
- d) There is potential for "chaos" in enforcement of law, or "appreciation of the effect of a change in settled law". Id.

The Court of Appeals has followed the Supreme Court's admonition in the application of retroactivity. In Faigenbaum v. Oakland Medical Center, 143 Mich. App. 303; at 312-313; 373 N.W.2d 161 (1985) and King v. General Motors Corporation,

136 Mich. App. 301; at 306; 356 N.W.2d 626 (1984), the Michigan Court of Appeals attempted to synthesize the standard for limited retroactivity to a consideration of the following: 1) The purpose of the new rule; 2) The general reliance upon the old rule; and 3) The effect of retroactive application of the new rule on the administration of justice. As discussed below, application of these factors to the retroactive effect of the Dow decision on the General Property Tax Act of 1893 lends only to a conclusion of limited retroactivity.

Further, it should be noted that in Shavers v. Attorney General, 402 Mich. 554; 267 N.W.2d 72 (1978), the Court held portions of the no-fault motor vehicle insurance act constitutionally deficient

in failing to provide due process, but ordered its decision to be effective 18 months from the date of the decision to give the legislature and the state insurance commissioner time to remedy the act's deficiencies. The Court was hesitant to invoke retroactivity so it made its decision prospective. Thus, Petitioner's claim that all decisions holding a statute to be unconstitutional are given complete retroactivity is not true in the State of Michigan, since Shavers was completely prospective.

Petitioner has conceded that Faigenbaum sets forth or synthesizes a standard for limited retroactivity, but argues that such a standard is inapplicable to decisions which hold a statute unconstitutional. Petitioner improperly

relies on Gallego v. Glasser Crandell Co., 388 Mich. 654; 202 N.W.2d 786 (1972) and Stanton v. Lloyd Hammond Produce Farms, 400 Mich. 135; 253 N.W.2d 114 (1977), for the position that decisions declaring statutes unconstitutional are always accorded full retroactivity. While the Supreme Court appeared to favor full retroactivity in those cases, its ruling in Tebo has changed that preference. Petitioner ignores the later Michigan Supreme Court proclamation in Tebo, supra, that the Court "favor[s] only limited retroactivity when overruling prior law." Petitioner also ignores the Supreme Court's discussion in Stanton which states:

"We are not unmindful that certain factual circumstances might warrant the retroactive application of an unconstitutional statute. In Dearborn Fire Fighters Union Local No. 412, IAFF v Dearborn, 394 Mich

299; 231 NW2d 226 (1975), Justice Levin, citing Lemon v Kutzman, supra, wrote that "[d]ecisions holding legislative acts unconstitutional have, on occasion been given limited retroactivity in recognition of the necessities of governmental administration." Stanton, supra, at page 147. (emphasis added and in original)

The Court in Dow, did not address the issue of whether the decision was to be given prospective or retroactive application. Thus, even before the limited retroactivity standard in Tebo and Faigenbaum, the Courts were moving towards limited retroactivity for all decisions overruling prior law, including those rendering a statute unconstitutional.

Petitioner has relied upon Fladger v. Detroit Non-Profit Housing Corp. (Court of Appeals No. 25642, decided

November 29, 1976), an unpublished, non-binding opinion. The plaintiff therein filed its Complaint in 1972, and the Court of Appeals issued its opinion in 1976, after Dow had been decided and released. Thus, Fladger is only an example of limited retroactivity since it was pending at the time of the Dow decision.

Similarly, in Luster v. Bank of Chelsea, 730 P. 2d 506 (Okla, 1986), a case cited by Petitioner in the courts below, a quiet title action brought by a tax sale purchaser which involved the issue of adequacy of notice by publication was filed in 1981, then the U. S. Supreme Court issued Mennonite Board of Missions v. Adams, 462 U.S. 791; 103 S.Ct. 2706; 77 L. Ed. 2d 180 (1983), and

thereafter the Oklahoma Supreme Court followed the Mennonite decision in 1986. Though the state limitations period had expired, Luster represents an instance of limited retroactivity since the Oklahoma Supreme Court merely applied a decision from the U. S. Supreme Court which was released during the pendency of the litigation. It is important to note that the Mennonite decision was given limited retroactivity only, even though it involved a determination that notice by posting and publication was unconstitutional, a decision almost identical to Dow.

Clearly, limited retroactivity is not only allowed but is the preferred rule in this matter. Presuming, arguendo, that such is not the case, Petitioner's logic

would suggest that the Michigan Supreme Court, although never specifically so stating, intended that its Dow decision in 1976, would have effect back to enactment of the General Property Tax law in 1893. Such a suggestion is ludicrous in that it would disrupt the record of title as well as the interests of, and even the very lives of, all individuals possessing such property, as well as all property, that at some point in the last 90 years, had been subject to tax-reversion proceedings. As a result, the chaos that would result in the 82 various offices of the County Registers of Deeds and County Treasurers of this state, countless title companies, realtors, oil, gas and mining corporations, as well as the common landowners of the State of Michigan, is incalculable.

The results of full retroactivity of Dow, thereby voiding every tax sale and tax deed back to 1893, would be chaotic. Vested real property rights would be lost or disrupted; millions of dollars from sale or lease of property would be lost to the State; the respective county treasurers would have to review all past tax sales; every drilling unit now producing oil or gas which underlies any State land would be subject to extensive litigation; our State forests, campgrounds and parks could be almost eliminated. The effect upon the settled law, on property rights, and State and local governing bodies would be of such magnitude, that only limited retroactivity of the Dow case is appropriate.

Dow has not, and should not, be applied with full retroactivity. In

holding that Dow should be given limited retroactivity, the circuit court specifically considered the possibility of "unfettered chaos" from full retroactivity, in its Opinion, and the Court of Appeals properly affirmed.

It is noteworthy that the United States Supreme Court has endorsed departures from the ordinary retroactivity rule. Linkletter v. Walker, 381 U.S. 618; 85 S.Ct. 1731; 14 L. Ed. 2d 601 (1965). In Linkletter, supra, a state criminal habeas corpus case, the Court announced that "the Constitution neither prohibits nor requires retrospective effect" for new rulings. The proper approach was to "weigh the merits and demerits" of retroactivity in each case "by looking to the prior history of the

rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." In Linkletter, involving a split between the various Courts of Appeals on the issue of retrospective operation of a United States Supreme Court decision that unconstitutionally seized evidence is not admissible in state courts, the United States Supreme Court in rejecting full retroactivity, did not require "pure prospectivity": the new constitutional requirements were applied to all cases still pending on direct review at the time the new rule was announced.

Stovall v. Denno, 388 U.S. 293; 87 S.Ct. 1967; 18 L. Ed. 2d (1967), another criminal due process case, articulated more fully the criteria on retroactivity

which includes the extent of the reliance by law enforcement authorities on the old standards, and "the effect on the administration of justice of a retroactive application of the new standards."

Since retroactive application "... is not compelled, constitutionally or otherwise, Solem v. Stames, 465 U.S. 638, 642 (1984), a state "... in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward". Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932).

Because, as the trial court and the Court of Appeals have held, the Michigan Supreme Court favors limited retroactivity, and due to the potentially severe

effect on state and local government, as well as private property owners, if given full retroactivity, the decision of the trial court, as affirmed by the Court of Appeals, to apply Dow with limited retroactivity is proper. The Petition for Writ of Certiorari to the Supreme Court of Michigan should be denied.

B. EVEN IF GIVEN FULL RETROACTIVE EFFECT, DOW WOULD NOT BE APPLICABLE PRIOR TO THE MICHIGAN SUPREME COURT DECISION IN GOLDEN, IN 1964, UPHOLDING NOTICE BY PUBLICATION.

Notice of tax sale by publication was constitutional at the time of the tax sale in this case. The property taxes have not been paid since 1937 and, pursuant to the General Property Tax Act, the property was deeded into the State in 1940. Petitioner argued below that the

General Property Tax Act was declared unconstitutional in Dow v. State of Michigan, 396 Mich. 192; 240 N.W.2d 450 (1976). Nothing could be further from the truth. The Michigan Supreme Court actually held in Dow as follows:

"Personal service is not required. Notice by mail is adequate. Mailed notice must be directed to an address reasonably calculated to reach the person entitled to notice. Mailing should be by registered or certified mail, return receipt requested, both because of the greater care in delivery and because of the record of mailing and receipt or non-receipt provided. Such would be the efforts one desirous of actually informing another might reasonably employ. If the state exerts reasonable efforts, then failure to effectuate actual notice would not preclude foreclosure of the statutory lien and indefeasible vesting of title on expiration of the redemption period." Id., at 211.

In Dow, supra, the Michigan Supreme Court ruled that notice by publication alone

was insufficient to notify an owner of an interest in real property of an impending tax sale. It should be noted that the Supreme Court specifically held that the State only need exert "reasonable efforts" towards ascertaining all owners of an interest in real property; it was not necessary to effectuate actual notice. Further, the Court notes therein that "reasonable efforts" would be presumed to have been expended, if the State gave notice to all parties whose interests were recorded with the Register of Deeds or those of whom the county assessor or treasurer had actual knowledge.

Nowhere in Dow, supra, nor in any of the subsequent Court of Appeals cases applying or interpreting Dow, does it

specifically order that the holding be given blanket retroactivity. To do so would require that notice by certified mail be made to all owners of an interest in any property anywhere in the State for which the taxes have been delinquent from 1976 back to 1893 when the General Property Tax Act was passed. Such a determination would result in utter chaos and would remove any consistency or finality to tax judgments at any time in the past, - as the Court logically would have had to rule that all redemption periods were still open.

The effect of Dow was to overrule the previous holding of the Michigan Supreme Court in Golden v. Auditor General, 373 Mich. 664; 131 N.W.2d 55 (1964). In that case, in 1964, the Supreme Court had spe-

cifically upheld the constitutionality of notice by publication, only.

In Golden, the Michigan Supreme Court upheld the "caretaker theory" which held that a property owner was imputed knowledge of the necessity of payment of property taxes, and is expected to exercise due diligence therein. As noted in Golden, Michigan's statutory provision for notice by publication in tax foreclosure proceedings was sustained against a due process challenge by the United States Supreme Court in Longyear v. Toolan, 209 U.S. 414; 28 S.Ct. 506; 52 L. Ed. 2d 859 (1908). Golden, then, in 1964, reaffirmed the constitutionality of notice by publication. During the period of the tax sale, and the redemption period thereafter, in this cause, the

State of Michigan gave the statutorily-prescribed notice, and protected Petitioner's constitutional rights.

Further, in this case, it is certainly expected that the trustees of an estate, as fiduciaries, would exercise due diligence as required by Golden, as to all claims against the trust properties whether raised by a government agency or private persons. However, Petitioner has readily admitted that there was no activity involving the properties from the "Probate Court Order Assigning Residue" of February 20, 1931, until the "Supplemental Order of Distribution" on February 25, 1971.

As Petitioner admits, Respondent State of Michigan did give notice by publication of all lands at issue.

Notice by publication was specifically upheld as constitutional by the U. S. Supreme Court in 1908 and then by the Michigan Supreme Court in November, 1964. Petitioner's predecessor in title having failed to exercise due diligence in paying their taxes, they cannot now be heard more than 40 years later to complain of the insufficiency of notice.

The trial court, relying upon the decisions of the U. S. Supreme Court and Michigan Supreme Court that were in effect at the time of the tax sale, ruled that the tax sale at issue was proper and constitutional.

The property at issue reverted to the State in 1940. Golden, supra, upheld the constitutionality of notice by publication alone, in 1964. The estate's bene-

ficial interest passed by quit-claim deed to Petitioner in 1972. Dow was not decided until 1976. The trial court and Court of Appeals quite properly ruled that at all times pertinent, notice by publication was constitutional, and the tax sale proper.

C. THE TRIAL COURT PROPERLY RULED AND THE COURT OF APPEALS AFFIRMED THAT APPELLANT'S CLAIMS ARE BARRED BY M.C.L. 600.5801.

M.C.L. 600.5801 provides in pertinent part:

"No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.

* * *

"When the defendant claims title under some deed made by an officer of this state or of the United States

who is authorized to make deeds upon the sale of lands for taxes assessed and levied within this state the period of limitation is 10 years."

Petitioner admitted that Respondent became owner of said real property in 1938, pursuant to a judgment of tax foreclosure. The appropriate statute of limitations provides that any action by a plaintiff seeking recovery of property where the defendant claims title through a tax deed must be brought within 10 years of the time defendant claims title. Thus, in this case, Petitioner's claim has been barred for over 40 years.

The trial court ruled, based on the above, that Petitioner's claims were "time-barred" since over 10 years had elapsed since the State took possession and title to the property.

Petitioner addresses this issue only briefly, at page 11 of its petition, but concedes that this "appears" to be the correct statute of limitations. Petitioner contends, however, that the ten-year statute of limitations only begins to run after the date of the Dow, supra, decision. Although not discussed in any detail, Petitioner seems to be relying on Herrick v. Taylor, 113 Mich. App. 370; 317 N.W.2d 631 (1982), for that contention. Scrutiny of the relevant dates in Herrick, indicates the dissimilarity between that case and the present case. In Herrick, a passenger was injured in an automobile accident which occurred on May 1, 1974. The guest passenger statute, M.C.L. 257.401; M.S.A. 9.1201, was ruled unconstitutional in Manistee Bank and Trust Company v.

McGowan, 394 Mich. 655; 232 N.W.2d 636 (1975), on September 8, 1975. Herrick filed his Complaint on May 17, 1977, some sixteen days past the three-year statute of limitations. The Michigan Court of Appeals in Herrick ruled that the statute of limitations continued, but only because the statute of limitations had not run at the time of the Manistee decision.

In Herrick, the Court had to struggle to reach an equitable result, and to shift the commencement of the statute of limitations to the decisional date of Manistee Bank. In so doing, the Court attempted to distinguish Bauman v. Grand Trunk Western Railroad Company, 41 Mich. App. 611; 200 N.W.2d 444 (1972), lv. den. 388 Mich. 793 (1972).

Bauman leaves no doubt but that the general rule is that the statute of limitations continues to commence from the date of injury, notwithstanding an intervening decision overruling or changing prior law. As stated above, in Herrick, the statute of limitations was only extended because the intervening decision occurred during the original period for bringing a claim. Neither situation can be claimed by Petitioner. Under the applicable statute of limitations, M.C.L. 600.5801; M.S.A. 27A.5801, the claim accrues from the time the State claimed title under tax-reversion proceedings. Thus, Petitioner's claim commenced in 1938 or 1940, and was barred after 1950. It is interesting to note that Petitioner's claim would be barred even if the statute provided that the claim

accrued through its predecessor in title, since Petitioner took by quit-claim deed in 1972 and did not bring this action until 1985.

Petitioner's argument at page 11 of its petition that it, and all persons similarly situated, should have ten years to file their claim, beginning on April 1, 1976, the date Dow was decided, is not supported by Herrick or any other decision. Petitioner is contending that this Court should hold that all persons whose property reverted to the State, after non-payment of taxes and notice of tax foreclosure proceedings by publication only, between 1893, when the General Property Tax Act was enacted and 1976, when Dow ruled notice by publication only unconstitutional, should have until 1986

to file a claim for unjust enrichment or to quiet title. Petitioner's assertion that such a decision would not "open the flood gates of tax deed litigation", because it was the only claimant to discover this statute of limitation, underscores the fallacy in their argument since the purposes of a statute of limitation are not served where potential claimants are unaware of the time period for filing a claim.

Petitioner's assertion that the statute of limitations does not commence until 38 years after the State took title ignores the policy reasons for a statute of limitations. As set forth in Bigelow v. Walraven, 392 Mich. 566, 576; 221 N.W.2d 328 (1974):

"Statutes of limitations are intended to "compel the exercise of a right of action within a reasonable

time so that the opposing party has a fair opportunity to defend"; "to relieve a court system from dealing with 'stale' claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured"; and to protect "potential defendants from protracted fear of litigation".'" Id., at 576.

When applying these principles to the instant case, the State would submit that the claims are, indeed, stale, that it may be impossible to divine the facts at issue, and that the State would not be able to fully and fairly defend against these claims, at this late date. A review of the pleadings evidences the parties' unsuccessful efforts at discovering the disposition of all the parcels of property.

In the instant case, the Michigan Court of Appeals was correct in its Opinion when it determined as follows:

"The State complied with existing procedures for the tax sales, which procedures were deemed proper until Golden, supra was overruled by Dow, supra, some 34 years after the tax sales occurred. Because the tax deeds of 1942 were prima facie valid, the 10-year limitations period began running at that time. MCL 600.5801; MSA 27A.5801. See also Fitschen v Olson, 155 Mich 320, 323-324; 119 NW2d-3 (1909). Upon completion of the 10-year period, the State's title was no longer open to question. See Toll v Wright, 37 Mich. 93 (1877)."

Petitioner's claim that the statute of limitations does not commence until 1976 based upon the decisional date of Dow, even though the State took title in 1940, is illogical, inconceivable in light of the policy reasons for a statute of limitations, and unsupported by the case law.

It should be noted that the defenses of res judicata, laches, adverse possession and the Marketable Record

Title Act, M.C.L. 565.101, et seq.; M.S.A. 26.1271, et seq., were never ruled upon by the trial court. However, the issues of res judicata and laches were briefed before the circuit court.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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